No. 88-979

Supreme Court, U.S.
FILED
FEB 1 1989
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all other similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *Petitioners*,

v.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DEPERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI and VICTOR OLIVADOTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE," the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint. *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Trustees of the New York State Teamsters Conference Pension and Retirement Fund ("the Teamsters Fund"), respectfully request that this Court deny the petition for writ of certiorari to the Second Circuit. The Second Circuit's opinion is reported at 853 F.2d 1071 and is included in the Appendix to the Petition for a Writ of Certiorari.[1]

STATEMENT OF THE CASE

Respondents fully adopt the statement of facts from the decision below. We restate the salient points only to remedy significant omissions in Petitioners' statement.

In 1973 the Trustees of the Teamsters Fund and the Trustees of the Brewery Workers Pension Fund ("the Brewery Fund") executed a merger agreement. After one of the largest contributing employers to the Brewery Fund announced that it was closing its covered operations, the Trustees of the Teamsters Fund ("Trustees") refused to proceed with the merger. The Brewery Fund sued, and the Supreme Court of New York ordered the Trustees to proceed with the merger. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, Index No. 9997/74 (O'Connor, J., April 11, 1974), *aff'd*, 49 A.D.2d 744 (1975).

A condition precedent to the merger was a determination by the Internal Revenue Service ("IRS") that the merged plan was a "qualified plan" within the meaning of the Internal Revenue Code ("IRC"). The Trustees argued before the IRS, that the Brewery Fund, and therefore the merged fund, was not qualified. The IRS rejected that position and concluded that the merged plan was qualified. (A.4). The Trustees appealed the IRS determination to the United States Tax Court and ultimately to the Second Circuit. That appeal was dismissed

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[1] References to the Petition and the Appendix will be cited "(P. ——)" and "(A. ——)," respectively.

for lack of jurisdiction. *See Wenzel* v. *Commissioner of Internal Service*, 707 F.2d 694 (2d Cir. 1983).

After the IRS determination, the Brewery Fund returned to court and received a second judgment enforcing the provisions of the merger agreement. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, Index No. 9997/74 (Calabretta, J., April 12, 1977), *aff'd*, 62 A.D.2d 1046 (1978). That judgment ordered the Trustees to accept the assets of the Brewery Fund, pay all obligations of the Brewery Fund and pay all benefits to Brewery Fund participants. *Id.*

The Trustees also brought suit in the United States District Court for the District of Columbia, arguing that, under the Employee Retirement Income Security Act ("ERISA"), the merger required the approval of the Pension Benefit Guaranty Corporation ("PBGC"). This effort to void the merger also failed when the District of Columbia Circuit affirmed the district court's dismissal of the Trustees' complaint on the ground that "the execution and repudiation of the merger agreement occurred prior to the effective date of ERISA." *New York State Teamsters Conference Pension and Retirement Fund* v. *PBGC*, 591 F.2d 953, 957 (D.C. Cir. 1979).

In a final (continuing) effort to void the merger, the Trustees returned to the IRS, arguing that the closure of certain breweries prior to the effective date of the merger resulted in a "partial termination" of the Brewery Fund within the meaning of section 411(d)(3) of the IRC (26 U.S.C. § 411(d)(3)) and, because Brewery Fund regulations did not adequately address this event, the Brewery Fund lost its tax qualified status before the merger. The IRS agreed that a partial termination had occurred, but concluded that the Brewery Fund nonetheless retained its tax qualified status. (A.5). That decision was appealed to the Tax Court, which upheld the

IRS. An appeal to the Second Circuit is pending. *Loftus* v. *Commissioner* (Docket Nos. 88-4107 and 88-4109) (argued on January 23, 1989).

Against this background and thirteen years after the initial decision upholding the merger, Petitioners brought this action seeking an order unwinding the merger on the theory that by agreeing to the merger, and subsequently failing to dishonor it and violate the orders of the New York Supreme Court, the Trustees breached their fiduciary duty. The United States District Court for the Northern District of New York found that theory untenable and dismissed the complaint. The Second Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. No Special And Important Reasons Exist To Justify Review By This Court

None of the three questions presented for review by Petitioners can be answered in their favor unless this Court concludes that the Trustees were obligated to place themselves in contempt of the New York Supreme Court. Petitioners claim that (1) § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), (2) ERISA, 29 U.S.C. § 1001, *et seq.*, and (3) § 411(d)(3) of the Internal Revenue Code, 26 U.S.C. § 411(d)(3), compelled the Trustees to defy the state court orders and stop paying benefits to those participants in the merged plan who had formerly been participants in the Brewery Fund. We demonstrate in Section II., *infra*, that the Second Circuit correctly rejected each of those contentions. At the outset, however, we emphasize that none of the typical reasons for granting review on writ of certiorari are met.

First, there is no claim that the decision of the Second Circuit conflicts with the decision of another federal court of appeals or the decision of a state court of last resort. No such conflict exists. Instead, as the decisions

involving this same matter illustrate (see, pp. 2 to 4, *supra*), the state courts, the Second Circuit, the District of Columbia Circuit and the IRS all agree that the only permissible course was that followed by the Trustees.

Second, the petition does not present an important question of federal law which should be decided by this Court. Instead, every issue posed by Petitioners may be answered by the fundamental proposition stated by the Second Circuit:

> The Participants cite no authority, and our research discloses none, to support the remarkable notion that fiduciary duty can require deliberate disobedience of a valid judicial order. On the contrary, it is more likely that obedience to such orders *insulates* a fiduciary from claims of breach of duty. *See* III A. Scott, *The Law of Trusts* § 259 at 2217 (3d ed. 1967 & Supp. 1985).

(A.8). That proposition is nothing more than black-letter law. 76 Am. Jur. 2d *Trusts* § 312 at 531 (1975) ("It is the duty of a trustee to comply with orders of a court * * *"); *Id.* at § 285 (if a trustee honors court decree, he cannot be found to have breached his fiduciary duty). *Accord*, 1 *Restatement of Trusts (Second)* § 220 at 514 (1959). Because Petitioners' claims were rejected by application of well-settled legal principles, discretionary review by this Court is not warranted.

II. The Court Below Considered And Correctly Decided The Issues

The Second Circuit examined each of the contentions presented here for review. As we demonstrate, it correctly determined that each was unfounded.

A. There Was No Breach Of Fiduciary Duty Under § 302(c)(5) Of The Labor Management Relations Act Because There Is No Structural Defect

The first issue presented by Petitioners is whether a federal court is authorized "to enforce the fiduciary duties of Trustees of multi-employer pension plans when

a clear breach of such duties created a structurally defective merger between two plans * * *?" That question, however, is not presented on this record because the Second Circuit properly found that its premise—that any breach of duty resulted in a structural defect—is not correct.

> We are not convinced that it is a structural violation of section [302(c)(5)] to pay benefits to Brewery Fund beneficiaries who, by virtue of the New York courts' orders, *are* members of the merged Teamsters Fund. The possibility that such payments may affect the fund's solvency is more properly an issue of trust *administration* and therefore an ordinary matter of fiduciary duty not litigable under section [302].

(A.12-13) (emphasis in original). That conclusion is clearly correct. If anything, it would have been a structural defect if the Trustees would have refused to pay benefits to some of the Fund's participants on the ground that they were once participants in the Brewery Fund. Therefore, this case cannot serve as the vehicle for deciding whether federal courts may remedy a breach of fiduciary duty which results in a structural defect.

Moreover, Petitioners' § 302(c)(5) claim rests solely on the actions of the Trustees in entering into the merger in 1973. (P. 5). Manifestly, that claim is precluded by New York's six-year statute of limitations, which applies to actions brought under § 302(c)(5). *Valle* v. *Joint Plumbing Industry Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980). Accordingly, because Petitioners' claim under § 302(c)(5) is barred by the statute of limitations, there is no occasion to reach the question presented.

B. The Trustees' Conduct At Issue Here Is Not Actionable Under ERISA

Petitioners ask this Court to review the Second Circuit's conclusion that the Trustees' 1973 decision to merge with the Brewery Fund and the consequences of that deci-

sion are actionable under ERISA. Section 514(b)(1) of ERISA unequivocally states that it "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Accordingly, the Second Circuit held that "the core" of Petitioners' argument (the contention that the Trustees agreed to the 1973 merger without making sufficient inquiry into the financial condition of the Brewery Fund) was not actionable under ERISA.

> It is true that ERISA establishes a statutory standard of care for pension plan fiduciaries. See 29 U.S.C. § 1104 (1982). But even if the alleged failure to inquire fell below that standard, it is not by itself actionable under ERISA because it occurred before January 1, 1975, the date ERISA became effective.

(A-6) (citations omitted).

The Court of Appeals also rejected Petitioners' continuing violation argument, reasoning that:

> The Participants nevertheless contend that the initial breach of fiduciary duty in entering into the merger agreement is still actionable under ERISA because it taints subsequent and current payments of benefits to brewery workers pursuant to the agreement. We are not persuaded, however, that this "continuing breach" analysis brings the Participants' breach of duty claim within the coverage of ERISA. Section 1144(b)(1) expressly provides that ERISA does not supersede state law "with respect to . . . any act or omission which occurred[] before January 1, 1975." Courts have uniformly rejected the theory that pre-ERISA acts are actionable under ERISA if they generate consequences after ERISA's effective date. See *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501-02 (9th Cir. 1984); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656-57 (9th Cir. 1983); *Coward v. Colgate-Palmolive Co.*,

> 686 F.2d 1230, 1233-34 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 840-41 (1st Cir. 1981); *Martin v. Bankers Trust Co.*, 565 F.2d 1276, 1278-79 (4th Cir. 1977). Participants' theory "would read . . . section [1144](b)(1) out of the statute," *id.* at 1279; *accord Coward*, 686 F.2d at 1234. Accordingly, we hold that ERISA does not cover the Participants' claims based on either the alleged breach of fiduciary duty in entering into the 1973 merger agreement or the subsequent payment of benefits to brewery workers pursuant to the merged plan.

(A.7). That conclusion is consistent with the holding of the District of Columbia Circuit, which also held that § 514(b)(1) precludes an ERISA-based challenge to the merger. *New York State Teamsters Conference Pension and Retirement Fund* v. *PBGC*, 591 F.2d 953, 957-58 (D.C. Cir. 1979). As demonstrated by the passage quoted above, the Second Circuit's conclusion is also consistent with the holdings of four other federal courts of appeal. Inexplicably, even the cases cited in the petition support that proposition. (*See* P.7). Accordingly, review by this Court would serve no purpose.

C. Partial Termination Under The Tax Code Did Not Reduce The Vested Pension Benefits Of Brewery Workers And Thus The Trustees Did Not Breach Their Fiduciary Duty By Paying Brewery Retirees Benefits

Petitioners' final argument rests on a single phrase in § 411(d)(3) of the IRC, 26 U.S.C. § 411(d)(3), which provides that upon partial termination of a pension plan, benefits of the affected employees are vested "to the extent funded." Petitioners read this language to require a forfeiture of otherwise vested benefits where a pension plan's assets are insufficient to meet vested benefits. According to Petitioners, the effect of § 411(d)(3) is to limit the benefits of Brewery Fund participants to the

assets of that fund in 1976, when a partial termination occurred.

Petitioners' argument is without merit. Acceptance of their position would require the Court to rewrite the statute to provide that upon partial termination benefits of affected employees are vested "[only] to the extent funded." That judicial amendment would defeat the purpose of the statute. Section 411(d)(3) is designed to protect beneficiaries by insuring that an employer may not prevent participants from vesting by terminating them prior to their normal vesting date. *United Steelworkers of America, AFL-CIO* v. *Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983). Consistent with this purpose, the IRS (*see* A.9-11), the Third Circuit (*Harris*, 706 F.2d 1298) and the Second Circuit all agree that § 411(d)(3) cannot be used as a device to divest beneficiaries where the plan is not adequately funded.

Even if the construction of § 411(d)(3) were debatable, it does not follow that the "tax event" of partial termination obligated the Trustees to deprive some of the beneficiaries of the Teamsters Fund of their vested benefits. As stated by the Second Circuit:

> We need not delve further into the actuarial minutiae of pension plan funding and taxation, however, to resolve the question of fiduciary duty presented by this appeal. We are convinced that possible underfunding of the merged plan does not place the Trustees under a *fiduciary obligation* to cease payments to Brewery Fund beneficiaries. Indeed, by virtue of the orders of the New York courts, the Brewery Fund has been fully merged into the Teamsters Fund and the Trustees have a fiduciary relationship to the beneficiaries of the Brewery Fund as well as to the Participants. We are not persuaded that under these circumstances ERISA or the Internal Revenue Code compel the Trustees to prefer one group of beneficiaries over the other.

(A.11).

These conclusions are clearly correct and consistent with all other authoritative constructions of § 411(d)(3). Therefore, they do not present an issue meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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